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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 775

FREDERIC W. PROCTER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

FREDERIC W. PROCTER,
Pro Se.

THOMAS H. FISHER,
Of Counsel.

UNITED STATES LAW PRINTING CO., PHONE LAKEVIEW 6881, CHICAGO, ILL.

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vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Summary Statement of Matter Involved.

Your petitioner, Frederic W. Procter, praying for a writ of certiorari to review a decision in the United States Circuit Court of Appeals for the Fourth Circuit, respectfully submits:

This is a gift tax case. On January 13, 1939 petitioner executed an Indenture of Trust, appearing on page 22 of the Transcript of Record. This Trust Indenture recited that petitioner was the owner of certain future interests

under the *inter vivos* trust established by petitioner's grandfather, Harley T. Procter, on December 29, 1914 and under the testamentary trust established by Article Sixth of the Last Will and Testament of Harley T. Procter which was probated in New York County on June 4, 1920 (R. 22-3).

Petitioner's mother, Lillian S. Procter, was granted a life estate under both the *inter vivos* trust and the testamentary trust; and Lillian S. Procter was living on the date said trust indenture was made on January 13, 1939 (and is still living) (R. 42). Under the *inter vivos* trust, the amount of petitioner's future interest was entirely dependent upon the number of children of Lillian S. Procter (including petitioner) who might be living on the date of her death (R. 33-5).

Petitioner's future interests under both trusts were pledged as collateral security to petitioner's *demand* notes totaling $686,300.03 held by his mother (R. 1). On June 1, 1942 petitioner's mother demanded payment of his $686,300.03 promissory notes (R. 2); and on November 12, 1942 petitioner sued to restrain foreclosure of his future interests which were pledged to secure these notes (R. 2, 83). On August 7, 1945 the Superior Court of Berkshire County, Commonwealth of Massachusetts, rendered an opinion in petitioner's suit to restrain foreclosure of his future interests which were pledged to secure his $686,300.03 promissory notes, in which opinion it was held that petitioner's mother, Lillian S. Procter, had the right to foreclose these notes and to sell petitioner's future interests under both said *inter vivos* trust and said testamentary trust and to apply the proceeds of such sale upon said notes (R. 84-9).

On August 28, 1945 a final decree pursuant to said opinion was entered in the State Court of Massachusetts (R. 83); and on September 26, 1945 Lillian S. Procter served a "Notice of Sale" of all of petitioner's future interests under said *inter vivos* trust and said testamentary trust, said sale to be held on October 5, 1945 (R. 90). (Although it does not appear in the record in this cause, said sale was actually held on October 5, 1945 and petitioner's entire future interests under both said trusts were purportedly sold to a buyer at said sale represented by Arthur Windels, a New York attorney.)

By the foregoing Trust Indenture petitioner, "in consideration of his love and affection for his children and his desire to provide for their future" and other considerations, irrevocably transferred, assigned and conveyed to three trustees "*so much* of all his right, title and interest in and to the trust fund and remainder created by" said *inter vivos* and testamentaryy trusts "as *will remain* (a) after the satisfaction and payment of the indebtedness to Lillian S. Procter represented by the aforementioned seven notes" held by petitioner's mother totaling $686,300.03 (R. 24).

Out of the foregoing future interests of petitioner under said *inter vivos* and testamentary trusts, petitioner first retained a life estate under the foregoing Trust Indenture, and petitioner then granted and conveyed to his two children and others the remainder interest under said Trust Indenture which constitutes the alleged gift in this case (R. 24-5).

Under Article Ninth the Trust Indenture was made irrevocable; and under Article Twelfth the Trust Indenture was to be "in all respects governed, construed and regulated by the laws of the State of New York" (R. 30-1).

The stipulated value of the corpus of each of the two trusts on the date of the transfer was $928,593.70 in the *inter vivos* trust and $961,551.68 in the testamentary trust (R. 2, 57).

Petitioner and respondent stipulated before The Tax Court of the United States to certain actuarial factors from which it was possible to determine that PROVIDED (1) petitioner was the only child of his mother on the date of her death and PROVIDED (2) that petitioner's $686,300.03 promissory notes were not foreclosed by his mother in her lifetime, the value on January 13, 1939 of petitioner's future interests under both the *inter vivos* and testamentary trusts was either $165,016.95 or $166,400.58 (R. 72, 80).

Said valuation failed to take into account the two essential factors (a) that petitioner's mother, Lillian S. Procter, might die leaving another child or children than petitioner, and (b) that petitioner's mother, Lillian S. Procter, might foreclose on his $686,300.03 notes in her lifetime. Since the gift under the *inter vivos* trust was to the class of persons described as all of Lillian Procter's children living on the date of her death or their descendants, it was an impossibility for The Tax Court of The United States (or anyone else) to place any actuarial or other valuation upon this contingency. It was equally impossible for The Tax Court of the United States, or anyone else, to determine by any actuarial or other means the effect upon petitioner's future interests under both said *inter vivos* and testamentary trusts of (1) a foreclosure by his mother, Lillian S. Procter, of petitioner's $686,300.03 promissory notes and (2) a sale of petitioner's future interests in connection with the foreclosure.

Accordingly, and in conformity with the foregoing, petitioner and the Commissioner of Internal Revenue, as respondent, by their respective attorneys, entered into *a further stipulation of facts* under which it was specifically provided, as follows:

> "8. That no actuarial or other recognized method exists to determine the following:
>
> "(a) Whether Lillian S. Procter will or will not foreclose on the security pledged under petitioner's $686,300.03 notes during her lifetime.
>
> "(b) Whether the fair market value of the corpora of the two trusts created by Harley T. Procter on December 29, 1914 by Article Sixth of his Last Will and Testament will or will not exceed the sum of $686,300.03 upon the date upon which Lillian S. Procter forecloses on said security pledge or dies.
>
> "(c) What will be the fair market value of the corpora of said two trusts, if any, after the petitioner's notes of $686,300.03 are satisfied and paid, in fact.
>
> "(d) Whether Lillian S. Procter will die leaving children other than Frederic W. Procter or grandchildren other than Frederic W. Procter, Jr. and Patricia Marise Procter" (R. 2-3, 75-6).

Statement of Basis of this Court's Jurisdiction.

The decision of the Circuit Court of Appeals for the Fourth Circuit in this case affirming the decision in The Tax Court of the United States, directly conflicts upon a question of Federal law with the provisions of Sections 501, 502 and 506 of the Revenue Act of 1932 as Amended and Article 19 of Treasury Regulations 79 and Section 86.19 of Treasury Regulations 108, as well as with the decision of this Court in *Robinette* v. *Helvering*, 318 U. S. 184.

The Question Presented.

There is only one question presented:

Is the gift of a part of a donor's future interest, which future interest itself cannot be valued and *therefore has no fair market or other value of any kind or nature whatsoever in the donor's hands,* subject to the Federal gift tax?

Reasons for the Allowance of the Writ.

Until the decision in this case, Sections 501, 502 and 506 of the Revenue Act of 1932 as Amended, which specifically provide that a gift to be subject to the gift tax must have some "value" in fact, have invariably been construed to provide that the conveyance of all or part of future interests which are subject to such contingencies as to be without any possible valuation by any actuarial or other recognized method *in the hands of the donor,* are not intended to be subject to the gift tax. This clearly appears from the provisions of Section 506 of the Act which specifically provides:

> "If the gift is made in property, the *value* thereof at the date of the gift *shall be considered the amount of the gift"* (26 U. S. C. A., Sec. 1005) (Italics added),

and from the opinion of Mr. Justice Black in the case of *Robinette* v. *Helvering,* 318 U. S. 184.

Article 19 of Treasury Regulations 79 and Section 86.19 of Treasury Regulations 108* both provide that the "value" of gifts of property, as the word is used in the Revenue Act, means "the price" at which the property would "change hands" between a willing buyer and a willing seller. Property, however, which in fact has no "value"

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* See Appendix at page 17 below.

at all can have no "price" within the meaning of the Act, and as this Court has held in *Guggenheim* v. *Rasquin*, 112 U. S. 254, the Regulations cannot change the meaning of the word "value" in the Act itself.

It therefore amply appears that the decision of the Circuit Court of Appeals for the Fourth Circuit in this case is *directly in conflict upon a question of Federal law* with Sections 501, 502 and 506 of the Revenue Act of 1932 as Amended and with the decisions of this Court in the *Robinette* and *Guggenheim* cases.

The question involved in this case is most important. If taxpayers are to be subject to a gift tax upon transfers of all or part of future interests *which have themselves no computable or ascertainable value whatever in the hands of the donor* and if the principle laid down by Mr. Justice Black in the *Robinette* case is to be ignored in the Circuit Courts of Appeal, it should only be upon a square decision by this Court to that effect.

This case is *not* one in which *the donor* by the terms of his gift has himself imposed conditions thereon which render the amount of the gift to the donee of no computable or ascertainable value. The *Robinette* case appears to be a square decision in this Court holding such a gift to be taxable at the full value of the gift to the donor. In this case, on the contrary, the property given had no computable or ascertainable value *in the hands of the donor.*

The reason why this case is so important to all tax-payers is that in this case the future interests a part of which was the subject of the gift were *without computable or ascertainable value in fact in the hands of the donor, as stipu-*

lated by the Commissioner himself at the trial in the Tax Court. Until the decision in the Circuit Court of Appeals in this case, the Commissioner has never sought to levy a gift tax upon property which the Commissioner has himself stipulated was in the donor's hands without any computable or ascertainable value whatsoever.

WHEREFORE petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court on a day to be designated, the full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; that said final order of said Circuit Court of Appeals be reviewed or altered by this Honorable Court; and petitioner also prays for such other, further or different relief as may seem proper.

And this petitioner will ever pray, etc.

FREDERIC W. PROCTER,
Pro Se.

THOMAS H. FISHER,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The United States Circuit Court of Appeals for the Fourth Circuit rendered its original opinion on the first appeal in this case on April 11, 1944. The opinion is reported in 142 Fed. (2d) 824 and is set forth on pages 1 to 7 of the Record. Subsequently, a petition for rehearing having been filed, the Circuit Court rendered its supplemental opinion on May 31, 1944 denying the petition. The opinion is reported in 1942 Fed. (2d) 828 and is set forth on pages 8 to 9 of the Record.

The Circuit Court rendered its opinion on the second appeal in this case on October 30, 1945. The opinion is set forth on pages 91 to 94 of the Record, and has not been reported.

Jurisdiction.

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Fourth Circuit on October 30, 1945. A writ of certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911 c. 231, §240, 36 Stat. 1157 as Amended February 13, 1925, c. 229, §1, Stat. 938).

Statement of the Case and Questions Presented.

For a statement of the case and of the questions presented, see pages 1 through 8 above.

Specification of Errors.

The Circuit Court of Appeals for the Fourth Circuit erred:

1. In affirming the judgment of The Tax Court of the United States in this cause.

2. In not reversing the judgment of The Tax Court of the United States in this cause.

3. In finding that the future interests owned by petitioner, a part of which were transferred by petitioner into trust, were of such a computable or ascertainable value as to be subject to the gift tax under the Revenue Act of 1932 as Amended.

4. In not finding that the future interests owned by petitioner, a part of which were transferred into trust by petitioner for the benefit of his children, were without computable or ascertainable value in the donor's (and donees') hands by any actuarial or other recognized method, as stipulated by the Commissioner of Internal Revenue in The Tax Court of the United States, and were therefore not subject to gift tax.

ARGUMENT.

Frederic W. Procter, "an improvident son of an indulgent mother," gave his two children, Billy and Patricia, on January 13, 1939, property which *would then have been* "actuarially worth" to him between $165,016.95 and $166,400.58, *except* that he *would only become* the owner of such property *PROVIDED*:

1. That Lillian S. Procter, his mother, left no other children than Frederic W. Procter on her death; and
2. That Mrs. Procter did not foreclose and sell her son's property to someone else under the power contained in his $686,300.03 promissory notes, before her son should ever receive it.

The Commissioner of Internal Revenue *STIPULATED* that the conditions attached to the above ownership made it an IMPOSSIBILITY to value the property in the donor's hands subject to these conditions. See pages 75-6 and 92-3 of the Transcript.

The Circuit Court of Appeals for the Fourth Circuit affirmed the Tax Court's finding that the donor must pay a gift tax on a gift of a part of such property *even though the value thereof to the donor could not be ascertained by any known means.* The basis of the Circuit Court's opinion was, however (R. 94), that "the value of the gift was susceptible of computation," in spite of the *stipulation of fact* by the Commissioner of Internal Revenue in The Tax Court *diametrically to the contrary* that the value of the property given was *not* susceptible of computation (R. 76, 93).

An examination of all three of the Circuit Court's opinions fails to show any reason why a gift tax could properly be levied in this case except upon the theory expressed by the Circuit Court itself, *i.e.*, "that the value of the gift was susceptible of computation". But the Circuit Court utterly fails to show in its opinions how a gift can have a "value susceptible of computation" in the face of the fact that the Commissioner of Internal Revenue has himself signed and filed in the Tax Court by his attorneys a *stipulation of fact* squarely stating that the property in the hands of the donor a part of which is the subject of the gift in this case had no "value" which was susceptible of computation (R. 76, 93).

The question of whether property has a value is a question of fact, not a question of law. A value to be susceptible of computation must be so susceptible in fact. No mere legal argument can ever been adduced to prove any such susceptibility to valuation *in fact*. The Commissioner was necessarily compelled to stipulate that there was no such susceptibility to valuation *in fact* in this case. How, then, can the Circuit Court rest its affirmance of the Tax Court's decision upon any such finding of fact *when the Commissioner has himself stipulated that no such fact exists?* As this Court clearly stated in the case of *Robinette* v. *Helvering*, 318 U. S. 184, in the language of Mr. Justice Black, there are limits to the powers of courts to place a "value" upon property. In that case the donor owned the property outright and conveyed it to her issue provided (1) that she married; (2) that she had children; and (3) that the children lived to the age of 21 years. Judge Black said:

> "Actuarial science may have made great strides in appraising the value of that which seems to be unap-

raisable, but we have no reason to believe from this record that even the actuarial art could do more than guess at the value here in question."

In the *Robinette* case, since the donor owned the property given outright, it was quite properly held that the gift tax should be levied upon the whole property transferred, and that such value should not be cut down by the fact that the contingencies imposed voluntarily by the donor rendered the property of no computable or ascertainable value in the hands of the donee.

Certainly *the same principle* should be applicable to a case such as this in which the property has no computable or ascertainable value *in the hands of the donor;* and this is in full conformity with Section 506 of the Revenue Act of 1932 as Amended.

We are not here dealing with what *criterion of value* should be employed for determining the "value" of gift property under the Revenue Act. That, as this Court has said in *Powers* v. *Commissioner,* 312 U. S. 259, is a question of law. But where there is no valuation of the property in the donor's hands possible at all, which is the stipulated fact in this case, then Section 506 of the Act is not applicable at all. For this Section provides:

> "If the gift is made in property, the *value* thereof at the date of the gift *shall be considered the amount of the gift"* (26 U. S. C. A., Sec. 1005) (Italics added).

Thus if the property in the donor's hands has, as a matter of fact, no "value," the gift has no "amount," and the tax fails.

Both Treasury Regulations 79, Art. 19(1), promulgated October 30, 1933, and Treasury Regulations 108, Sec. 86.19*

* See Appendix at page 17 below.

state that the "value" of gifts of property as the word is used in the Act means "the price" at which the property would "change hands" between a willing buyer and a willing seller. But of course property which in fact has no "value" at all (which is the fact in this case) can have no "price" within the meaning of the Act or the Regulations; for, as this Court held in *Guggenheim* v. *Rasquin*, 312 U. S. 254, the Regulations cannot change the meaning of the word "value" in the Act itself.

There would appear to be no escape from the foregoing conclusion. It surely cannot be held that the Commissioner's stipulation of fact filed in the Tax Court can later be disregarded by the Circuit Court to the disadvantage of the taxpayer who relied thereon in the Tax Court.

It surely cannot be maintained that a gift of property which has *no actual value in fact* to the donor is subject to the gift tax at *a fictitious value which is not its true or actual value in fact as determined by some actuarial or other recognized method.*

It surely cannot be maintained that the Commissioner's letter of determination of value is *prima facie* valid, when the Commissioner has himself *stipulated to facts inconsistent therewith.*

Under the *Robinette* case, if Mr. Procter had *owned outright* $165,000 of securities and had made a conditional gift thereof to his children, it would follow that he would be properly subject to the gift tax on the amount of $165,000, even though the conditions voluntarily imposed by him upon the gift rendered its value to the donees but not to him of an indeterminate and unascertainable amount.

But in this case the taxpayer gave away, not property which was owned outright by himself, but part of certain future interests *which he himself had only a conditional right to receive;* and it was such *conditional* receipt by him which rendered its valuation *in his hands* an impossibility in fact, as the Commissioner stipulated. It is important to note that *in the very language of the Trust Indenture itself* the taxpayer only transferred, assigned and conveyed "*so much* of all his right, title and interest in and to the trust fund and remainder created by" said *inter vivos* and testamentary trusts "as *will remain* (a) after the satisfaction and payment of the indebtedness to Lillian S. Procter represented by the aforementioned seven notes" given by him to his mother totalling $686,300.00 (R. 24).

In other words, the taxpayer clearly had only a *possible right* to receive an interest in the remainders under his grandfather's trusts, but this property owned by him was not susceptible to valuation in his hands as required by Section 506 of the Act imposing the gift tax. Under Section 506 of the Act, the Federal Congress plainly said that the "value" of the "property" "shall be considered the amount of the gift." Therefore, when the property given is without "value" there can be no "amount of the gift" within the language of Section 506; and since there is neither value nor amount within the meaning of the Act there is no gift tax.

Conclusion.

A petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in this case is herefore respectfully prayed, to the end that the judgments of the Circuit Court and of The Tax Court of the United States may be reversed.

Respectfully submitted,

FREDERIC W. PROCTER,
Pro Se.

THOMAS H. FISHER,
Of Counsel.

APPENDIX.

Treasury Regulations.

REG. 108, SEC. 86.19. VALUATION OF PROPERTY. —(a) General.—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 775

FREDERIC W. PROCTER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The original memorandum opinion of the Tax Court of the United States (R. 56–64) was entered July 6, 1943, and is unreported. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit reversing that decision and remanding the case to the Tax Court, filed April 11, 1944, and its *per curiam* opinion on rehearing, filed May 31, 1944 (R. 1–9), are reported in 142 F. 2d 824, 828, certiorari denied, 323 U. S. 756. The memorandum opinion of the Tax Court on remand (R. 74–80) was entered March 31, 1945,

and is unreported. The opinion of the United States Circuit Court of Appeals affirming that decision (R. 91–94), filed October 30, 1945, is reported in 151 F. 2d 603.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 30, 1945. (R. 95.) The petition for a writ of certiorari was filed January 25, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner's gift to his children of his remainder interests in two trusts created by his grandfather was incapable of valuation and therefore exempt from gift tax.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 501. IMPOSITION OF TAX.
>
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.
>
> (b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible

or intangible; * * * The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

* * * * *

STATEMENT

On January 13, 1939, the petitioner, Frederic W. Procter, made a gift in trust to his surviving children or the issue and widows of any children predeceasing him of so much of his future right, title, and interest in each of two trusts which had been established by his grandfather as would remain after the payment of a debt owed to his mother of $686,300.03 (R. 23–32). The petitioner reserved a life interest in the trusts he had created (R. 24). On the date of the transfer in question the petitioner was 36 years of age and his mother 63 (R. 57). One of the trusts created by petitioner's grandfather was an *inter vivos* trust (R. 32–37); the other was testamentary (R. 37–39). Under the terms of the *inter vivos* trust, valued at $928,593.70 at the date of the gift, the petitioner was to receive the corpus thereof upon the death of his mother, the life tenant, if he survived her.[1] Under the terms of the testamentary trust, valued at $961,552.68 at the date of the gift, he was to receive the corpus

[1] His share was subject to theoretical diminution if his mother should have other children who might survive her. However, since she was 63 years old at the time of this transfer, that contingency has never been regarded as an element in this case.

thereof upon the death of his mother if he reached the age of 40 and survived her. (R. 57.)

On the original hearing the Tax Court held that, since the petitioner's debt to his mother was payable on demand it should be deducted from the value of the petitioner's interests in the corpora of the trusts his grandfather had created at the date the taxpayer made the gift (R. 63). The court below agreed with the Tax Court in this respect (R. 3), but reversed its decision to the effect that the gift had no value, because in its view the Tax Court had misapplied certain stipulated actuarial factors and had thus determined the value of the petitioner's interests in the trusts at the date of the gift not with reference to his mother's death, when he would become entitled thereto, but with reference to his own death, when his children would receive the economic benefits thereof (R. 4). The court below therefore remanded the case to the Tax Court for further proceedings not inconsistent with its opinion (R. 7); that is, to determine the amount of the tax by the use of a formula which the court below explained and which involved the application of what it regarded as the proper criteria in its determination.

The court below also rejected the petitoner's contention that the Tax Court's decision should be affirmed on the ground, among others, that the interests of the petitioner in the trusts his grandfather had created were of too contingent a char-

acter to be valued for gift tax purposes (R. 5), and thereafter denied a petition for a rehearing in which the petitioner had again contended that the gift was incapable of valuation because it was of contingent remainders (R. 9).

Thereafter this Court denied the taxpayer's petition for certiorari to review the decision of the court below reversing and remanding the case to the Tax Court, 323 U. S. 756. The petition was based on the ground, among others, that the gift was without computable or ascertainable value and was therefore not subject to tax. See petition for certiorari, No. 376, October Term, 1944, p. 7. Furthermore, as a reason for granting the writ, the petitioner alleged that the decision of the court below was in direct conflict in that regard with the decision of this Court in *Robinette* v. *Helvering*, 318 U. S. 184. (*Ibid.*)

Upon the hearing on remand, the Tax Court computed the value of the gift in accordance with the mandate of the court below, again rejecting the petitioner's contention that the gift was incapable of valuation. The court below thereupon affirmed the Tax Court's decision, also again rejecting the taxpayer's contention that the gift was incapable of valuation. (R. 94.)

ARGUMENT

In his present petition for certiorari, the petitioner has merely renewed the contention made in his former petition which this Court denied

(323 U. S. 756), namely that his gift of the remainder interests in the two trusts was incapable of valuation and therefore had no value for federal gift tax purposes, and that, accordingly, the decision of the court below is in conflict with *Robinette* v. *Helvering,* 318 U. S. 184. The present petition merely assumes, contrary to the finding of both the Tax Court and the court below, that the gift cannot be valued. See, e. g., the question which the petitioner says is here presented. (Pet. 6.)

This assumption is based upon two considerations: first, that the petitioner's mother might die leaving a child or children other than the petitioner; and second, that his mother might foreclose "on his $686,300.03 notes in her lifetime." (Pet. 4.)

(a) Under the *inter vivos* trust, petitioner's remainder was subject to diminution in the event that his mother died leaving other children, who would share in the remainder with petitioner. (R. 33.) No such provision was contained in the testamentary trust, under which the petitioner was to take the entire corpus if he survived his mother and reached forty years of age. (R. 38.)

As to petitioner's remainder in the latter trust, the court below correctly held that since the contingent remainders of other beneficiaries would fall in only if petitioner's remainder failed, that is, in the event that he died before his mother, the

value of these other remainders was irrelevant. (R. 94.) The contingency that petitioner's mother might predecease him had already been taken into account in determining the value of the gift, since the value of the corpus of the trust had been discounted by means of actuarial factors which had been stipulated.

The court below evidently considered the same reasoning applicable to the *inter vivos* trust. The contingency that petitioner's mother might have other children who would reduce petitioner's share was properly ignored in the circumstances of this case. Petitioner did not argue in either of the courts below that the *inter vivos* trust was to be treated differently from the testamentary trust by reason of this consideration, and the parties as well as both courts below have at all times treated this trust as one in which the petitioner would receive the entire corpus in the event that he survived his mother. Moreover, since his mother was 63 years of age at the time of petitioner's gift, such a remote contingency could properly be ignored. Cf. *City Bank Farmers' Trust Co.* v. *United States*, 74 F. 2d 692 (C. C. A. 2d). Indeed, under *Robinette* v. *Helvering*, 318 U. S. 184, upon which the petitioner relies, it is plain that the amount of the taxable gift is not to be diminished on account of any such remote and unascertainable contingency.

(b) Petitioner's contention that the gift cannot be valued because of the uncertainty as to

when or whether his mother might foreclose on the property to enforce her claim of $686,300.03 is a mere quibble. To be sure, it may be impossible to know when or whether his mother might seek enforcement of her claim. But, in determining the value of the gift, the Tax Court and the court below made the assumption *most* favorable to the taxpayer, namely, that his mother might proceed at once; and in computing the taxable gift, the amount of her claim was therefore subtracted in full in computing the value of petitioner's gifts.

CONCLUSION

This Court has already refused to review this case, and the present petition presents no additional reasons of substance for review. The petition should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

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ARNOLD RAUM,
HELEN R. CARLOSS,
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FEBRUARY 1946.

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